80-6508

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

****

DURKIN WOODRUFF,

Petitioner

v.

HARRY L. ALLSBROOK, et al.,

Respondents

****

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
ATTORNEY GENERAL

Richard N. League
Special Deputy Attorney General

N. C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

(919) 733-2011

ATTORNEYS FOR RESPONDENTS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

****

DURKIN WOODRUFF,

Petitioner

v.

HARRY L. ALLSBROOK, et al.,

Respondents

****

BRIEF OF THE RESPONDENTS HARRY L. ALLSBROOK, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

OPINION BELOW

JURISDICTION

QUESTIONS PRESENTED

Pursuant to Rule 34 of the Rules of the Supreme Court, these items are omitted.

LEGAL PROVISIONS

28 USC §2254(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written opinion, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issues was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Petitioner is a prisoner of the State of North Carolina who on 3 October 1977 in the Superior Court of Forsyth County North Carolina, Honorable James Long, Judge Presiding, entered a plea of guilty in case number 77 CR 685 in which he was charged with armed robbery. Upon his plea, he was sentenced to imprisonment for life by Judge Long. At trial, petitioner was represented by Gary J. Walker, Esquire, court-appointed counsel form the Forsyth County Bar and did not appeal or otherwise seek

appellate review of his conviction. However, on 28 April 1978, he collaterally attacked his sentence by a pro se motion in the Superior Court of Forsyth County. This was renewed on 9 November 1979 after which H. Dwight Nelson, Esquire, of the Forsyth County was appointed to represent petitioner. An evidentiary hearing was then held on 3 December 1979 before Honorable Julius A. Rousseau, Jr., Judge Presiding. At its conclusion, Judge Rousseau denied petitioner relief and an application to the North Carolina Supreme Court for a writ of certiorari to review Judge Rousseau's order was denied on 16 May 1980. Petitioner then filed an application for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina, Woodruff v. Allsbrook, C-80-280-G. On 7 October 1980, after consideration of both the application and respondent's return, Honorable Russell A. Eliason, Jr., United States Magistrate, recommended dismissal of the application. On 24 October 1980, this recommendation was accepted by Honorable Eugene A. Gordon, United States District Judge, and the United States Court of Appeals for the Fourth Circuit affirmed this on or about February 20, 1981.

STATEMENT OF THE FACTS

The facts necessary to an understanding of the question presented will be set out in the following section of this Response.

REASONS THE WRIT SHOULD NOT ISSUE

A WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE PETITIONER HAS RECEIVED THE FULLEST REVIEW OF HIS CONVICTION AUTHORIZED BY LAW, INCLUDING AN EVIDENTIARY POST-CONVICTION HEARING ON HIS CLAIM THAT HE WAS THE VICTIM OF A BROKEN PLEA BARGAIN AND ALL REVIEWS HAVE BEEN FAIRLY CONDUCTED IN ACCORDANCE WITH THE STANDARDS OF 28 USC §2254(d).

A writ should not issue in this case because petitioner has shown neither an incorrect result below nor any of the basis for normal exercise of the Court's discretion as set out in Supreme Court Rule 17.1, including

a departure from the standards set out by this Court and Congress for review of habeas corpus claims. Petitioner alleged a broken plea bargain in the District Court and now additionally claims there was an erroneous disposition of his case by the magistrate in accepting the state court findings rather than holding its own hearing. Neither claim, however, has any merit and should not further concern this Honorable Court.

As shown in the Statement of the Case, petitioner pled guilty in October 1977 to a charge of armed robbery and received a sentence of life imprisonment. The indictment is attached as Appendix A. At the time he pled guilty, he signed a form entitled "Transcript of Plea" which, among other things, indicated that he was not pleading pursuant to a plea bargain, had been informed that plea bargaining was approved and that if a bargain existed he could tell the court of it (TP Q 11), had been promised nothing in exchange for his plea (TP Q 13), and had not been told to give false answers to have his plea accepted. His lawyer and the prosecutor also signed the form, thereby certifying that petitioner's representations were true. A copy of this form is attached as Appendix B. Petitioner's written representations were confirmed by his oral testimony at the time of his trial, attached as Appendix C. These procedures were favorably described by the Court in Blackledge v. Allison, 431 US 63 (1977). Later, on 28 April 1978, petitioner moved to vacate his sentence on the ground that he had been promised a seven - ten year sentence. In a later filing in November 1978, he alleged his promised sentence was to be either seven - ten years or twelve - fifteen years. When an evidentiary hearing was held, petitioner testified that a fifteen year sentence was promised him, which one of his witnesses corroborated and which another did not. By contrast, his former lawyer testified for the state that no plea bargain or promise on a sentence had been made with or to petitioner

and that counsel had not had him lie to have his plea accepted. Based on his view of the credibility of this conflicting evidence, the presiding judge denied petitioner relief and his order is attached as Appendix D.

Ultimately, petitioner presented the same claim in the United States District Court for the Middle District of North Carolina, again alleging twelve - fifteen years as the bargain. The magistrate accepted the state court's findings and, after applying federal standards to them, recommended dismissal of the application. His recommendation is attached as Appendix E. Nothing was amiss in his doing this.

The District Court should have accepted the findings of the state court under Sumner v. Mata, _____ US _____, 28 CrL 3051, Jan. 21, 1981, if none of the deficiencies set out in 28 USC §2254(d) were present in the state court proceeding. Included in these deficiencies are the failure to resolve the dispute, an inadequate fact-finding procedure, an inadequate development of the facts, lack of counsel, an unfair or incomplete hearing, or any other denial of due process. None of these were present in petitioner's case but, by contrast, he received appointment of counsel, the right to call witnesses in his favor (which he utilized), the right to confrontation, adequate preparation and presentation of his case, and consideration by a judge previously unassociated with the case. Accordingly, insofar as the procedural issue involved in this application is concerned, petitioner could not have been more appropriately treated. Similarly, the substantive issue - the existence of a broken plea bargain - was resolved in that proceeding and, being solely a matter of witness credibility, presents nothing additional for review in this Honorable Court. Accordingly, a writ of certiorari should not issue for the review of this application.

CONCLUSION

In light of the foregoing, the reasons submitted by petitioner as a basis for this Court's review are insufficient for that purpose and a writ of certiorari should not issue to further review this case. Submitted as the Brief in Opposition to the Petition for Certiorari, this 26 day of June, 1981.

Respectfully submitted,

RUFUS L. EDMISTEN
ATTORNEY GENERAL

Richard N. League
Special Deputy Attorney General

N. C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

(919) 733-2011

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have placed a copy of the foregoing Brief in Opposition to Writ of Certiorari in the United States mail, postage prepaid, and addressed as follows:

Mr. Durkin Woodruff
Route 1, Box 36
Jackson, North Carolina 27845

This 26 day of June, 1981.

Richard N. League
Special Deputy Attorney General

APPENDIX A

STATE OF NORTH CAROLINA

County of Forsyth

File # 77CR685

Film #

In The General Court of Justice
Superior Court Division

The State of North Carolina

vs.

Durkin (NMN) Woodruff
Defendant

ARMED ROBBERY

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 6th day of January, 19 77, in Forsyth County Durkin (NMN) Woodruff unlawfully, wilfully, and feloniously having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a pistol whereby the life of Patrick Lee Goodwin was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away, and did attempt to tke, steal, and carry away money for the cash register,

of the value of _____ dollars, from the ~~xxxxxx~~, ~~xxxx~~, place of business, ~~xxx~~ ~~xxxxxxxx~~ of Bede, Inc., a corporation, d/b/a Hop-In Food Stores, Store #76, located at 2120 Stadium Drive, Winston-Salem, North Carolina, where at said time, the said Patrick Lee Goodwin was in attendance.

Donald K Tisdale
~~Assistant~~ District Attorney

WITNESSES:

XR. V. Venable

C. W. Crawley

The witnesses marked "X" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be ☑ a true bill ☐ not a true bill.

This 29th day of August, 19 77. That the undersigned Foreman hereby attests that 12 or more Grand Jurors concurred in the finding of this True Bill of Indictment.

Charles Smith
Grand Jury Foreman

G.S. 14-87
AOC-L Form 205
6/73

STATE OF NORTH CAROLINA APPENDIX B File # 77 CC 635

County of FORSYTH Film #

In The General Court of Justic

State of North Carolina Vs. Superior Court Division

Dickie Wade Duff

TRANSCRIPT OF PLEA

The defendant, having tendered a plea of Guilty and being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand me? Answer YES
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you? Answer YES
3. Are you now under the influence of alcohol, drugs, medicines, pills, or any other intoxicants? Answer NO
4. Have you discussed your case fully with your lawyer and are you satisfied with his services? Answer YES
5. Do you understand that you are pleading (guilty) (~~no contest~~) to the felonies of Robbery with Firearm ?
misdemeanors of ? Answer YES
6. Have the charges been explained to you by your attorney and do you understand the nature of the charges? Answer YES
7. Do you understand that upon your plea you could be imprisoned for a maximum of Life years ____ months (and that the mandatory minimum sentence is Five Years)? Answer YES
8. Do you understand that you have the right to plead not guilty and be tried by a jury and be confronted by the witnesses against you, and by this plea you give up these and your other constitutional rights relating to trial by jury? Answer YES
9. Do you now plead (guilty) (~~no contest~~)? Answer YES
10. (a) [If applicable] Are you in fact guilty? Answer YES
    (b) [If applicable] Do you understand that upon your plea of no contest you will be treated as guilty whether or not you admit your guilt? Answer ____
11. Have you agreed to plead as a part of a plea bargain? Before you answer, I advise you that the Courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval. Answer NO
12. [If applicable] The District Attorney and your counsel have informed the Court that these are all the terms and conditions of your plea: N/A

(a) Is this correct? Answer ____ (b) Do you accept this arrangement? Answer ____

(Continued on Reverse)

TRANSCRIPT OF PLEA (continued)

[Other than what I have just said] has anyone made you any promises or threatened you in any way to cause you to enter this plea? Answer No

Do you enter this plea of your own free will, understanding what you are doing? Answer Yes

Do you have any questions about what I have just said to you? Answer No

I am 22 years of age and completed the 8th grade of school.

I have read or have heard read all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. Neither my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case. The conditions of the plea as stated on the reverse hereof, if any, are accurate.

Date

Purkins Lee Woodruff
Defendant

Sworn to and subscribed before me this 4 day of October, 19 77.

Susan S. Fox
Clerk of Superior Court

* * * * * * * * * * * * *

As Attorney for the defendant, _____, I hereby certify that the conditions stated on the reverse hereof, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself upon which the defendant's plea was entered. I further certify that I have fully explained to the defendant the nature and elements of the charges to which he is pleading.

10/4/77
Date

Attorney for Defendant

As prosecutor for the _____ Judicial District, I hereby certify that the conditions stated on the reverse hereof, if any, are the terms agreed to by the defendant and his counsel and myself for the entry of the plea by the defendant to the charge in this case.

10/4/77
Date

Donald K. Tisdale
Prosecutor

* * * * * * * * * * * * * * * * * * *

PLEA ADJUDICATION

Upon consideration of the record proper, evidence presented, answers of defendant, and statements of counsel for the defendant and the prosecutor, the undersigned finds:

1. That there is a factual basis for the entry of the plea.

2. That the defendant is satisfied with his counsel.

3. That the plea is the informed choice of the defendant and is made freely, voluntarily, and understandingly.

The defendant's plea is hereby accepted by the Court and is ordered recorded.

This 4 day of October, 19 77.

James M. Long
Presiding Judge

APPENDIX C

NORTH CAROLINA)
)
FORSYTH COUNTY)

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
77-CRS-0685

STATE OF NORTH CAROLINA

vs.

DURKIN WOODRUFF

ORAL TRANSCRIPT OF PLEA

This was a criminal matter, heard before Honorable James M. Long, at the September 26, 1977, Session of the Forsyth Superior Court Division of the General Court of Justice of the State of North Carolina. The defendant, during his trial, changed his plea from one of not guilty to a plea of guilty. The following is the defendant's oral plea taken by the Court.

****

APPEARANCES OF COUNSEL

FOR THE STATE OF NORTH CAROLINA:

Donald K. Tisdale, Esq., District Attorney.

FOR THE DEFENDANT, DURKIN WOODRUFF:

Gary Walker, Esq.

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(IN THE ABSENCE OF THE JURY:)

MR. WALKER: Your Honor, at this time we would wish to change our plea from not guilty to guilty.

THE COURT: All right. Has the defendant prepared a transcript?

MR. WALKER: Yes, he has, Your Honor.

(Counsel handed to the Court a paper writing.)

BY THE COURT TO DURKIN WOODRUFF:

Q. Durkin Woodruff, if you would, please stand. Your attorney has indicated your desire to change your plea of not guilty to the charge of robbery with a firearm to a plea of guilty to that charge. I'd like to ask you some questions to determine whether you in fact do wish to do that. Are you able to hear and understand me?

A. Yes, sir.

Q. Do you understand you have a right to remain silent and that any statement you make may be used against you?

A. Yes, sir.

Q. Are you now under the influence of any alcohol, drugs, or medicines, pills, or other intoxicants?

A. No, sir.

Q. Have you discussed your case fully with your attorney, and are you satisfied with his services?

A. Yes, sir.

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Q. Do you understand you are pleading guilty to the felony of robbery with a firearm?

A. Yes, sir.

Q. And has this charge been explained to you by your attorney, and do you understand the nature of the charge?

A. Yes, sir.

Q. As I remember, you are charged in the Bill of Indictment with an attempt to commit armed robbery. Do you understand that an attempt to commit armed robbery is an attempt to take and to carry away the personal property of another, from his person or from his presence, without his consent, by endangering or threatening his life with a firearm, the taker knowing that he is not entitled to take the property, a nd intending to deprive the other of the use of the property permanently? Do you understand that that is what you are charged with?

A. Yes, sir.

Q. And do you understand that that is what you now will be pleading guilty to?

A. Yes, sir.

Q. Do you understand that upon your plea you could be imprisoned for the term of your natural life, and that there is a mandatory minimum sentence of five years in prison? Do you understand that?

A. Yes, sir.

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Q. Do you further understand you have a right to continue under your plea of not guilty, and to be tried by a jury, and be confronted by witnesses against you, and that by entering this plea you give up those constitutional rights and other rights related to trial by jury?

A. Yes, sir.

Q. Do you now plead guilty?

A. Yes, sir.

Q. Are you in fact guilty?

A. Yes, sir.

Q. And have you agreed to plead guilty as a part of a plea bargain; that is, are there any conditions to your plea of guilty? And before you answer that, I advise you that the courts have approved plea bargaining, and if there is a plea bargain, you may advise me truthfully, without fear of incurring my disapproval.

A. Yes, sir.

Q. Is there any plea bargain? Are there any conditions or deals that you have made with the State?

A. No, sir.

Q. Has the District Attorney or anyone else made any promise or threat to cause you to enter this plea?

A. No, sir.

Q. Do you enter the plea of your own free will, understanding what you are doing?

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A. Yes, sir.

Q. Do you have any questions about anything I have just asked you?

A. No, sir.

Q. I believe you are twenty-two years of age, and have completed the eighth grade in school; is that correct?

A. Yes, sir.

THE COURT: Let the defendant sign his transcript and be sworn to it.

(The defendant placed his left hand on The Bible and raised his right hand.)

DEPUTY CLERK SUSAN FRYE: Do you swear that you have read or heard read these questions and the answers sworn to are the ones you have given in open court, and are true and correct, so help you God?

THE DEFENDANT DURKIN WOODRUFF: So help me God!

THE COURT: The Court finds that the plea is voluntary, and accepts the plea, and orders it entered upon the record. You may call the jury back in.

(IN THE PRESENCE OF THE JURY:)

THE COURT: Members of the Jury, in your absence I have permitted the attorney and the defendant an opportunity to discuss the case further, and after the conference the defense attorney made a motion on behalf of the defendant to be allowed to withdraw his plea of not guilty and to

enter a plea of guilty to robbery with a firearm. I have examined the defendant carefully concerning that decision, and have found that his decision is voluntarily made and that it was not induced by any promise by the State or anyone else, and I have accepted that plea of guilty, which will remove the matter from your consideration and will then leave the matter to the Court in judgment. We will hear the remainder of any evidence without the necessity of a jury, and will enter such judgment as we feel is appropriate thereafter.

We had not anticipated a change of the plea, and for that reason the next jury case scheduled for trial is tomorrow morning, but there are a number of nonjury matters which will take up the remainder of my time today. It will not be necessary that you stay. You may step down. But if you'd like to remain until judgment has been entered in this case, you may do so; but if you prefer to return home or to work until tomorrow morning, you are free to do so at this time. You may step down.

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NORTH CAROLINA)
)
FORSYTH COUNTY)

CERTIFICATE

I, REGINALD G. MOORE, Official Court Reporter, do hereby certify that I stenographically recorded the proceedings in the case of STATE OF NORTH CAROLINA vs. DURKIN WOODRUFF, heard at the September 26, 1977, Session of the Forsyth Superior Court, before Honorable James M. Long, Judge presiding, and that the foregoing 6 typewritten pages is an accurate transcript of the oral transcript of plea by the defendant.

This 6th day of December, 1979.

Reginald G. Moore
OFFICIAL COURT REPORTER

APPENDIX D

NORTH CAROLINA)
)
FORSYTH COUNTY)

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

77-CRS-0685

DURKIN WOODRUFF,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

O R D E R

This matter came on to be heard before the undersigned in accordance with the order of the Honorable Peter W. Hairston directing that the defendant be given an evidentiary hearing concerning whether his plea was a voluntary plea and not coerced by his attorney; and it appearing that the defendant was present in court with his court-appointed attorney, Mr. H. Dwight Nelson, and that the State of North Carolina was represented by the Assistant District Attorney, Mr. Richard Lyle, and after hearing the evidence offered both by the defendant and by the State and considering the record proper and the transcript of the plea transcript, the Court makes the following findings of fact:

That the defendant was brought to trial in the Superior Court of Forsyth County on October 4, 1977, for the offense of armed robbery; that the defendant pled not guilty and a jury was impaneled; that the prosecuting witness identified the defendant as being one of three persons that came into his store; that the two co-defendants had prior to that time been tried for armed robbery and both were available in the Superior Court of Forsyth County; that one co-defendant testified, implicating the defendant; that at the next recess the attorney again talked to his client about entering a plea of guilty; that the attorney advised the defendant that he could get no commitment out of the District Attorney and that Judge Long would not make any commitment as to the term of any sentence on a plea; that the attorney advised the defendant that the other two co-defendants had been tried, that one received forty (40) to sixty (60) years, the other received twelve (12) to fifteen (15) years; that the attorney advised the defendant that there was no plea bargain, that he could not guarantee anything, but that he felt the evidence was overwhelmingly in favor of guilt, and that were the defendant to continue the not guilty plea and in the event he was found guilty, the attorney advised the defendant that in all probability he would receive a life sentence, that the attorney felt that the best procedure would be to plead guilty in hopes that the Trial Judge would impose a sentence less than life imprisonment; that when court reconvened from the recess, the jury was sent from the courtroom and the Court personally addressed the defendant with questions as set forth

on the standard transcript of plea; that the defendant stated that he had fully discussed his case with his attorney and was satisfied with his attorney's services; that he understood he was pleading guilty to a felony of robbery with a firearm, and that he understood that charge; he stated he understood what armed robbery was and the elements of attempt to commit armed robbery, and that he understood that he was pleading guilty to the armed robbery ; the defendant further stated to Judge Long that he understood that he could be imprisoned for the term of his natural life; the defendant further stated he understood he had a right to continue his plea of not guilty and be tried by a jury, but that the defendant stated he now pleaded guilty, that he was in fact guilty; that the Trial Court explained to the defendant that the courts had approved plea bargaining, and if there was any plea bargain that the defendant should advise the Court without fear of incurring any disapproval; that the defendant then stated in open court that there were no conditions or deals influencing him to plead guilty; that he further stated that the District Attorney nor had anyone else made any promises or threats to cause him to enter his plea of guilty; the defendant further stated that he entered his plea of guilty of his own free will, understanding what he was doing; thereupon, the Trial Court found that the plea was voluntary, and the Court accepted the plea and ordered it upon the record; thereafter, the Trial Court imposed judgment of life imprisonment.

This Court notes that the defendant had previously been charged with armed robbery and murder as a result of the armed robbery, and that the charge was reduced to manslaughter.

Based on the foregoing findings of fact, the Court concludes that the defendant has failed to satisfy the Court that there was ever any plea bargain or that he had been led to believe that there was a plea bargain, and to the contrary, the Court finds that there was no plea bargain and no basis for the defendant believing that there had ever been any plea bargain.

Therefore, it is ordered that the defendant's motion for appropriate relief is hereby denied.

The Clerk of this Court is directed to send a copy of this order to the defendant, and to his court-appointed attorney, Mr. Nelson, and to the District Attorney for the Twenty-first Judicial District.

This the 17 day of December, 1979.

Judge Presiding

PROVISIONAL REVOLUTIONARY FRONT
FOR THE LIBERATION OF THE UNITED STATES
(FRIEND OF THE OPPRESSED EVERYWHERE)
POLITICAL PRISONERS PROJECT;

FILED
CLERK OF SUPERIOR COURT
FORSYTH COUNTY, N.C.
JAN 3 10 43 AM '80
ASSISTANT CLERK OF SUPERIOR COURT

EXECUTIVE DIRECTOR
QUINCY WEST III.
ODCM CORRECTIONAL SUBSIDIARY
ROUTE 1 BOX 36
JACKSON, NORTH CAROLINA

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH
WINSTON SALEM, NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
DOCKET NO._____

DURKIN WOODRUFF, PRO SE

PETITIONER

VS:

THE STATE OF NORTH CAROLINA,

RESPONDENT

FILE NO. # 77-CR-0685

RE: NOTICE OF APPEAL; AND APPLICATION
FOR A COPY OF THE TRANSCRIPT O
THE PETITIONER'S DECEMBER 13,19
EVIDENTIARY HEARING, UPON AN
APPLICATION FOR APPROPTIATE RELI

SUBMITTED IN FORMA PAUPERIS; WIT
AN ATTACHED AFFIDAVIT ATTACHED O

TO: THE HONORABLE RESIDENT OR PRESIDING JURIST, PRESIDING OVER A CRIMINAL SESSION OF THE SUPERIOR COURT OF FORSYTH COUNTY, AT WINSTON SALEM, NORTH CAROLINA.....GREETINGS

NOW COMES THE PETITIONER, DURKIN WOODRUFF, AND HEREINAFTER ISSUE NOTICE THAT HE HEREBY GIVES NOTICE THAT HE WISHES TO APPEAL TO THE NORTH CAROLINA COUR OF APPEALS, THE DENIAL OF APPROPRIATE RELIEF APPLICATION IN THE SUPERIOR CCURT OF WINSTON SALEM/FORSYTH COUNTY, ON THE 13th. DAY OF DEC. 1979, BY THE HONORABLE JULIUS A. ROUSSOUR, JUDGE PRESIDING;
AND THAT THE PETITIONER REQUEST THAT A CERTIFIED COPY OF THE TRANSCRIPT BE COMPILED AND FORWARDED TO THE CLERK OF THE NORTH CAROLINA COURT OF APPEALS.

THAT AFTER SERIOUS CONSIDERATION OF THIS MATTER, THE PETITIONER FEELS THAT HE HAVE GOOD AND JUST CAUSE TO SEEK REVIEW IN THE ABOVE APPELLA COURT AND THAT THE PETITIONER'R EFFORTS ARE IN GOOD FAITH; AND THAT THE ISS PRESENTED ARE NOT FRIVOLOUS NOR DEVOID OF ANY MERIT.

Best Copy Available

Wherefore, IN ACCORDANCE WITH THE AFORESAID, THE PETITIONER AFTER GIVING NOTICE OF APPEAL; RESPECTFULLY REQUEST THAT HIS HONOR WILL:

(A). ALLOW THIS APPEAL TO PROCEED IN FORMA PAUPERIS AND GRANT LEAVE THEREOF;

(B). DIRECT THAT AN ORDER BE ISSUSED THAT AN APPEAL HAS BEEN MADE AND RECEIVED IN THIS MATTER;

(C). DIRECT THAT A CERTIFIED COPY OF THE APPROPRIATE RELI PROCEEDINGS BE COMPILED AND FORWARDED TO THE CLERK OF THE NORTH CAROLINA COURT OF APPEALS;

(D). DIRECT THAT AN ORDER BE COPILED DIRECTING THAT THE A PETITIONER BE FURNISHED A CERTIFIED COPY OF THE APPROPRIATE RELIEF TRANSC FOR THE PURPOSE OF FILING AN ADEQUATE APPEAL TO THE COURT OF APPEALS;

(E). AND THAT AN ORDER BE ISSUED ALLOWING THE PETITIONER ALL OTHER RELIEF THAT HE MAY BE ENTITLED TO RECEIVE;

RESPECTFULLY URGED

/s/ Durkin Woodruff
(PETITIONER) PRO SE
DURKIN WOODRUFF

NORTH CAROLINA)
NORTHAMPTON COUNTY)
) SS: VERIFICATION

I, DURKIN WOODRUFF, BEING FIRST DULY SWORN UNDER OATH, DEPOSES AND SAYS;
THAT HE HAS READ AND SUBSCRIBES TO THE ABOVE ENTITLED ACTION, AND THAT THE INFORMATION THEREIN PRESENTED IS TRUE AND CORRECT TO THE BEST OF HIS KNOWLEDGE AND BELIEF;

/s/ Durkin Woodruff
(AFFIANT-PETITIONER)

SWORN AND SUBSCRIBED TO BEFORE ME THIS
29th DAY OF December 1979.

Virginia T. Harrell
NOTARY PUBLIC

My Commission Expires 12-19-1982

Best Copy Available

80 62 431

77-685

SUPREME COURT OF NORTH CAROLINA

Spring Term 1980

****

STATE OF NORTH CAROLINA

v

DURKIN WOODRUFF

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

FILED
CLERK OF SUPREME COURT
RALEIGH, N.C.
MAY 19 9 32 AM '80
CLERK OF SUPREME COURT

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This cause came on to be considered upon the petition of the Defendant for writ of certiorari to review the Superior Court of Forsyth County; upon consideration whereof, it is adjudged by the Court in conference, this 6th day of May 1980 that the petition be denied and that it be so certified to the Superior Court of Forsyth County.

s/ Britt, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 16th day of May, 19 80.

John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: Barry S. McNeill, Associate Attorney
Durkin Woodruff, Defendant
Donald K. Tisdale, District Attorney
A. E. Blackburn, Clerk of Superior Court

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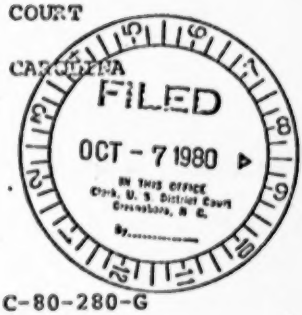
A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY Terry E. Watts
DEPUTY CLERK
May 16

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION



Durkin Woodruff,

Petitioner,

v.

Harry L. Allsbrook, et al,

Respondents.

C-80-280-G

N O T I C E

Attached to this Notice are Findings and Recommendations in the referenced action. They have been entered on the records of this court pursuant to Local Rule 50, Jurisdiction and Duties of Full-Time United States Magistrates and 28 U.S.C. § 636(b).

Sub-paragraph (C) of the referenced statute provides:

> "(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

You are hereby notified that unless written objections to the Findings and Recommendations are filed as provided in the statute, an appropriate order or Judgment will be entered on the Findings and Recommendations.

I hereby certify that on the 7th day of October, 1980, I deposited in the United States mail one true copy of this notice with copy of Magistrate's Findings and Recommendations attached, enclosed in a United States Government franked envelope, addressed to the attorneys listed below at the last known addresses, as follows:

Mr. Durkin Woodruff
Route 1, Box 36
Jackson, N. C. 27845

Mr. Richard N. League(2)
Special Deputy Atty. Gen.
Post Office Box 629
Raleigh, N. C. 27602

Carmon J. Stuart, Clerk

By: David Hayes
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DURKIN WOODRUFF, Petitioner	)	
v.	)	C-80-280-G
HARRY L. ALLSBROOK, et al, Respondents	)	

MAGISTRATE'S FINDINGS AND RECOMMENDATION

Petitioner challenges the voluntariness of his state court guilty plea pursuant to 28 U.S.C. § 2254. Most of the matters raised here were the subject of a state court post-conviction hearing. Because the state court determination fully and adequately explored this entire matter, this Court may accept those findings as presumptively correct. 28 U.S.C. § 2254(d), Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

Here, as in the state court, petitioner claims that he is a victim of a broken plea bargain by his attorney. He claims that his attorney promised him that he would only receive a sentence of 12 - 15 years if he pled guilty rather than a sentence of life imprisonment. Petitioner claims he did not want to plead guilty but was threatened by his attorney with receiving a life sentence if he did not. Furthermore, petitioner claims his attorney was ineffective because he failed to present certain evidence which would have shown petitioner's innocence.

At the state post-conviction hearing, petitioner, his sister, his mother, and his former counsel testified. While

petitioner testified that he was promised a 15-year sentence, his counsel presented a radically different picture. Counsel testified to the following facts. After a jury had been selected, the state put on evidence from the proprietor of the store which had been robbed and also that from an accomplice who was already serving time on the charge. Prior to that time, petitioner had been of the belief that his fellow accomplices would not testify against him. After it became apparent that both accomplices were willing to so testify, counsel called a recess and explored a plea bargain with petitioner. Counsel was of the opinion that petitioner had no defense to the charge and likely would receive a life imprisonment term if he proceeded with the jury trial. He discussed this matter with petitioner. He explained to petitioner that, while no assurances could be made, if petitioner pled guilty he might stand a better chance of receiving less than a life sentence. Counsel also was reluctant to let petitioner take the witness stand himself because of petitioner's prior record which included a manslaughter conviction.

Petitioner's counsel could not obtain any plea bargain assurances from either the judge or the district attorney. Petitioner was informed of this fact. Petitioner was specifically told that there would be no guarantee of his receiving a 15-year sentence such as the one received by one of petitioner's accomplices. (The other accomplice received a 40- to 60-year sentence.) Therefore, counsel told petitioner

that if he changed his plea the judge might take that fact into consideration in order to give him something less than a life term. The transcript of the plea and the verbatim record of the plea both disclose that petitioner under oath assured the court that no promises had been made to him. The judge reviewed these facts and further noted that petitioner had previously been through the plea bargaining process wherein he had been charged with armed robbery and murder and the charge was reduced to manslaughter. The Court found the credible evidence did not support petitioner's claim.

A review of the record and the state court judge's findings of fact show that no plea bargain had been made to plaintiff and that he voluntarily and intelligently pled guilty. While petitioner's counsel felt that pleading guilty might save petitioner from receiving a life sentence, the fact that it did not does vitiate the guilty plea. The advice an attorney gives his client which is a prediction of the sentence, even though erroneous, does not normally arfect an otherwise valid guilty plea. Vanater v. Boles, 377 F.2d 898 (4th Cir. 1967); Seiller v. United States, 544 F.2d 554 (2d Cir. 1975). In this case, pleading guilty did not save petitioner from receiving a life sentence. Nevertheless, it is clear that no promises were made to petitioner, and the attorney's prediction, even though it did not subsequently come true, has no effect on the guilty plea. The advice given by the attorney was reasonable under the circumstances. It is of no consequence that, perhaps as a

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result of petitioner's prior record or for some other reason, the court failed to give petitioner less than a life sentence. What he did obtain was a reasonable chance to obtain more lenient treatment, which is all petitioner had a reason to expect.

Petitioner's further contention that he received ineffective assistance of counsel because his attorney failed to present evidence at the trial establishing his innocence is without merit. Therefore, even though petitioner has failed to exhaust his state court remedies in that regard, the contention may be dismissed. In this case, petitioner has not even indicated what evidence should have been presented. In any event, it was petitioner who prevented this course of action from taking place since he aborted his jury trial and elected to plead guilty. As a result, this ground is no longer open to petitioner. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1601, 36 L.Ed.2d 235 (1973).

IT IS THEREFORE RECOMMENDED that the petition be denied and this action be dismissed.

Russell A. Eaton
United States Magistrate

October 7, 1980

A True Copy
Teste:
Carmen J. Stuart, Clerk
By: Carol Hayes
Deputy Clerk

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